RE TAN AH BA, EX P UOL FACTORING SDN BHD

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN J
[BANKRUPTCY NO: 29-604-96]
7 DECEMBER 1998

BANKRUPTCY: *Creditor's petition - Verifying affidavit - Service on debtor - Whether necessary - Bankruptcy Act 1967, s. 6(1) & Bankruptcy Rules 1969, r. 109*

This was the judgment debtor's appeal against the order of the Senior Assistant Registrar dismissing his notice of intention to oppose the petition. The sole issue here was whether the affidavit verifying the creditor's petition must be served on the judgment debtor.

Held:

[1] Both the Bankruptcy Act 1967 and the Bankruptcy Rules 1969 are silent on the service of the affidavit verifying a creditor's petition. However, if read together, they allude to and reflect a clear and definite need to serve such an affidavit.

[2] Section 6(1) of the Bankruptcy Act 1967 prescribes that a creditor's petition shall be verified by affidavit. Also, various case law authorities show that the verifying affidavit must be physically attached to the petition. As r. 109 of the Bankruptcy Rules 1969 prescribes that a creditor's petition shall be personally served, it goes without saying that the verifying affidavit annexed to the petition should also be personally served.

[3] An affidavit verifying a petition is a condition precedent to the issue of the creditor's petition and it is upon this affidavit that the Registrar exercises jurisdiction on the issuance or not of a creditor's petition. A debtor is entitled to know what statements in the petition have or have not been verified. For that reason alone, a verifying affidavit must be served on the debtor.

[4] In this instance, the omission to serve the verifying affidavit was a serious material defect in the proceedings. It rendered the proceedings, from the point of the hearing of the creditor's petition a nullity.

[Appeal allowed.]

Case(s) referred to:
Loo Cheng Liang v. Ban Hin Lee Bank Bhd [1992] 2 CLJ 1219 ***(refd)***
Ooi Thean Chuan v. Banque Nationale de Paris [1992] 2 CLJ 1225 ***(refd)***
Re Haroun Al-Rashid Mohd Yusof, ex p Daya Leasing Sdn Bhd [1996] 5 MLJ 317 ***(refd)***
Re Koh Kim Kuay, ex p MBf Finance Bhd [1995] 2 CLJ 145 ***(refd)***
Re Teoh Thean Peng, ex p D & C Leasing Sdn Bhd [1993] 2 MLJ 1 ***(refd)***
Re Yap Kim, ex p UMBC Bhd [1996] 5 MLJ 355 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 6(1)
Bankruptcy Rules 1969, rr. 106, 109, 110

For the appellant - Regina Denial; M/s Cheong Wai Meng & Van Buerle
For the respondent - Rajesh Kumar; M/s Kumar Jaspal Quah & Aishah
For the official assignee - Dharmasegaran

Reported by S Selvarajah

JUDGMENT

Jeffrey Tan J:

This appeal by the judgment debtor to judge-in-chambers against the order of the learned Senior Assistant Registrar of 7 July 1998 – dismissing the Notice By Debtor of Intention To Oppose Petition (Form 16 of the Bankruptcy Rules 1969) – turns solely on the issue of the service of the affidavit verifying the petition that both learned counsel agreed was not served on the debtor.

Miss Regina contended for the debtor that the affidavit verifying the petition must be served on the debtor. However Mr Rajesh contended for the creditor, and learned counsel submitted *Re Yap Kim, ex p UMBC Bhd* [1996] 5 MLJ 355 as "authority" for his proposition, that the verifying affidavit need not be served at all on the debtor.

Three provisions deal specifically with the verification and the service of a creditor's petition. Section 6 of the Bankruptcy Act 1967 (Act) prescribes that "a creditor's petition shall be verified by affidavit of the creditor or some person on his behalf having knowledge of the facts, and shall be served as prescribed". Rule 106 of the Bankruptcy Rules 1969 (Rules) prescribes that "a creditor's petition shall be verified by affidavit". The Rules also prescribe that "a creditor's petition shall be personally served" (r. 109), although the court may order substituted service, "if it is satisfied by affidavit or other evidence on oath that prompt personal service cannot be effected because the debtor is keeping out of the way to avoid service of the petition or any other legal process or for any other cause", to be effected in such manner as it thinks fit (r. 110). Otherwise, both the Act and Rules are silent on the service of the affidavit verifying a creditor's petition.

Still, it does not follow, just because the Act and Rules speak directly not of the service of the affidavit, that an affidavit verifying a petition is not required therefore to be served on a debtor? For the Act and Rules, read together, allude to and reflect a clear and definite need to serve an affidavit verifying a petition on a debtor.

Section 6(1) of the Act prescribes that "a creditor's petition shall be verified by affidavit". The prescribed form of the verifying affidavit (Form 11) thus begins, "I, the petitioner named in the petition hereunto annexed affirm ...". It all means, as Edgar Joseph Jr J (as he then was) spelt out clearly in *Ooi Thean Chuan v. Banque Nationale de Paris* [1992] 2 CLJ 1225; [1992] 2 MLJ 526 @ 534, that "the petition must be tied to ... or affixed to stapled to the verifying affidavit, so as to avoid any dispute as to what exactly is being verified". The learned judge even pointed out that "the correct and only satisfactory way to verify the contents of any document is to annex a copy of it to the verifying affidavit". *Re Yap Kim, ex p UMBC Bhd* [1996] 5 MLJ 355, 363), *Re Teoh Thean Peng, ex p D & C Leasing Sdn Bhd* [1993] 2 MLJ 1, *Re Koh Kim Kuay, ex p MBf Finance Bhd* [1995] 2 CLJ 145; [1995] 1 MLJ 792 and *Re Haroun Al-Rashid Mohd Yusof, ex p Daya Leasing Sdn Bhd* [1996] 5 MLJ 317 are all further authorities that the verifying affidavit must be physically attached to the petition. Rule 109 prescribes that a creditor's petition shall be personally served. And since a verifying affidavit should be annexed to the petition it goes without saying, without therefore the Act and Rules having to say so expressly, that the verifying affidavit would also be personally served, along with the personal service of the petition, on a debtor.

Mr Rajesh contended that *Yap Kin* is authority for his proposition that an affidavit verifying petition is not required to be served on a debtor. With respect *Yap Kin* is no such authority, for Kamalanathan Ratnam JC (as he then was) merely held, at p. 365, that the service of the affidavit verifying the petition **together** with the petition is not necessary. The learned judge did not propose nor propound, indeed not at all, just that Mr Rajesh understood it so, that the service of the affidavit verifying the petition is not necessary.

But how could it be that the service of the verifying affidavit is not necessary. An affidavit verifying a petition is a condition precedent to the issue of the creditor's petition. That affidavit contains the material upon which a registrar exercises jurisdiction on the issuance or not of a creditor's petition (*Loo Cheng Liang v. Ban Hin Lee Bank Bhd* [1992] 2 CLJ 1219; [1992] 2 MLJ 519). A debtor is entitled to know what statements in the petition have been or have not been verified. And that verifying affidavit, for that reason alone, quite apart from the fact that the Act and Rules prescribe so, must be served, on the debtor. In the instant case, the omission to serve the verifying affidavit was a serious material defect in the proceedings. It rendered the proceedings, from the point of the hearing of the creditor's petition, a nullity.

Accordingly, allowing this appeal, the receiving order and the adjudication order are hereby set aside, with costs (to be deducted from the judgment sum) to the appellant.